No. 12150

IN THE

United States Court of Appeals

For the Ninth Circuit

California Association of Employers, A California Corporation doing business under the firm name and style of Reno Employers Council,

Appellant,

vs.

Building and Construction Trades Council of Reno, Nevada and Vicinity, et al., and National Labor Relations Board,

Appellees.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the District of Nevada

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BROWN & WELLS
and THEODORE HAUGH,
10 State Street,
Reno, Nevada
for Appellant.

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STATEMENT AS TO JURISDICTION

California Association of Employers, a California corporation, qualified to and doing business in the State of Nevada under the fictitious name of RENO EMPLOYERS COUNCIL, on May 21, 1948, filed its complaint against the Building and Construction Trades Council of Reno, Nevada, and vicinity, and various local affiliates of said Council

working under a master agreement with the various members of Appellant (R.p.2) in the United States District Court for the District of Nevada. Appellant alleged that the action arose under Article 1, Sec. 8, Clause 3, of the Constitution of the United States and the Act of Congress 49 Stat. 449, U.S.C.A., Title 29, Secs. 151-166 as amended by Act of Congress 61 Stat. 136, Title 29, U.S.C.A., Secs. 151-197 (R.p.5). The Court issued an order to show cause and a temporary restraining order (R.p.45). Appellants filed a motion to vacate the Order to Show Cause and Restraining Order (R.p.47). On May 28, 1948, the Court dissolved the temporary restraining order and denied an application for a preliminary injunction. The National Labor Relations Board filed a Motion for Leave to Intervene (R.p.149) and the parties stipulated that the might do so (R.p.154), an order was so entered (R.p.158). All appellees filed motions to dismiss the Complaint (R.p.145, R.p.147, R.p.155) as did the Intervenor (R.p.158). Argument was had on the motion of the National Labor Relations Board to dismiss the Complaint (R.p.160). On the 16th day of September, 1948, the Court entered its order dismissing the Complaint (R. p.268) and within 30 days thereafter, to-wit: October 15, 1948, notice of appeal to this Court was duly filed (R.p.272). On October 15, 1948, bond for costs on appeal was furnished by appellant and filed (R.p.273). On October 15, 1948, the Court, upon application of appellant, entered its order extending the time to file and docket the record on appeal from forty to seventy days (R.p.276). On December 22, 1948, the Court, upon application of appellant, further extended said time to January 13, 1949 (R.p.276).

The jurisdiction of the District Court arose under section 24 of the Judicial Code (28 U.S.C.A. Sec. 41 (8)), and Section 274 (d) of the Judicial Code (28 U.S.C.A. 400).

The Circuit Court of Appeals has jurisdiction of this appeal pursuant to Section 128 of the Judicial Code, 28 U.S.C.A., Section 225; Rules 73 and 75 of Federal Rules of Civil Procedure of the United States.

STATEMENT OF THE CASE

On May 24, 1947, Appellant, representing some 94 business concerns engaged in the building and construction industry in the western part of Nevada, and in the eastern part of the State of California, entered into a master contract containing provisions for wages, hours, and terms of employment with the Building and Construction Trades Council of Reno, Nevada, and vicinity. The latter represented 17 American Federation of Labor Unions whose members were employed in said industry. The agreement, by its terms, was to be effective from May 24, 1947, to and including May 21, 1948 (R.p.4.).

On April 15, 1948, negotiations for a new contract were commenced (R.p.7). The employee group desired provisions in the contract relative to a closed shop or other from of union security. The employer group took the position that their industry was in interstate commerce or affected the same, in such a manner as to place the industry under the Labor Management Relations Act, 1947, c.120, Title 1, Sec. 101, 61 Stat. 136, 29 U. S. C. A. s 151 et seq., and there-

fore, no negotiations or contracts relative to a closed shop or union security could be entered into without the employee group first complying with the provisions of that Act relative to elections for the purpose of securing authority to request union security provisions in the contemplated agreement (R.p.8). The employee group refused to comply with the provisions of Sec. 8 A. 1. of the Labor Management Relations Act of 1947 (Chapter 120, Public Law 101) contending that the industry did not come under the purview of that act. The employer group contended that the master agreement could not be continued after May 21, 1948, unless such compliance was had, and on said date petitioned the Federal District Court for the State of Nevada, for a declaratory judgment to determine whether or not the National Labor Relations Act of 1947 governed and controlled any collective bargaining agreement between the parties, and for a temporary restraining order to maintain the status quo between the parties until judgment was entered (R.p.15).

All Appellees contended that the District Court was without jurisdiction and that the jurisdiction of the National Labor Relations Board was exclusive. The Court so held and dismissed the Complaint (R.p.266).

ARGUMENT

The District Court Had Jurisdiction to Determine the Controversy Under Declaratory Judgment Remedy Hence, Error to Grant Motion to Dismiss Filed By National Labor Relations Board.

Specification of Error No. 1

At the time of the filing of this suit Section 274 (d) of the Judicial Code (28 U.S.C.A. 400) read as follows:

> "(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.
>
> "(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.
>
> "(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

and Section 24 of the Judicial Code (28 U. S. C. A. 41(8)) read:

> "The District Court shall have original jurisdiction as follows: . . . (41(8)) Suits under interstate commerce laws."

The Labor Management Relations Act of 1947 did not divest District Courts of jurisdiction to grant declaratory judgments. Section 10(a) of the Act specifically states that the power of the Board shall not be exclusive in certain instances.

> "Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section (8) affecting commerce. The power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise . . ."

Rule 57 of the Federal Rules of Civil Procedure provides:

> ". . . The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate . . ."

In view of the foregoing, and despite the availability of other relief, declaratory relief was an appropriate remedy in the instant case if the other requisites for such relief appeared upon the face of the petition or complaint.

> *International Brotherhood, etc. v. Riley,*—N. H.—59 A 2d 476.

The requisite conditions and precedents which must be shown in order to obtain declaratory relief, in addition to jurisdictional requirements which are the same as in other types of actions (and which appear upon the face of the

complaint) are: (1) There must be a justiciable controversy; that is, a controversy "that is appropriate for judicial determination"; one that is not of "hypothetical or abstract character" or that is "academic or moot"; (2) The controversy must be between parties whose interests are adverse; (3) There must be a tangible legal interest in the controversy by the party asserting it; and (4) The issue presented must be ripe for adjudication.

> *Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227, 81 L.ed.617, 57 S.Ct. 461.

There was a justiciable controversy in the instant case, to-wit: a disagreement as to whether the industry involved was engaged in interstate commerce or affected the same in such a manner as to place the negotiations between the parties under the rules delineated in the Labor Management Relations Act of 1947 (R.p.8). The controversy was between parties whose interests were adverse (R.p.7). There was a tangible legal interest in the controversy by the party asserting it—for if the appellant entered into a contract providing for a closed shop or other union security provision and it were later determined that the industry represented came under the provisions of the Labor Management Relations Act of 1947, each of the firms represented by Appellant might, under the terms of that Act be subjected to penalties under the provisions thereof. The issue presented was ripe for adjudication. The parties were stalemated and the existing contract would, by its terms, expire at midnight, May 21, 1948.

In its opinion dismissing the Complaint (R.p.271) the District Court stated:

> ". . . I think it is conceded that the National Labor Relations Board has the jurisdiction to determine whether or not these unions are subject to the Taft-Hartley law. It may be that this court also has jurisdiction. I do not think that is a controlling point. Assuming that this court has jurisdiction under the declaratory judgment law, I do not think that the court should exercise such jurisdiction. I think there is some discretion that should be exercised under that declaratory judgment law . . ."

It is respectfully submitted that if jurisdictional elements exist the "discretion" of the Court is not as to entertaining the action, but as to entering or declining to enter the judgment after examining the facts and legal contentions.

Anderson, Declaratory Judgments, § 169.

Nor is the discretion absolute, as in granting or denying motions for a new trial in the Federal Court. It is a judicial discretion reviewable on appeal.

Franklin Life Ins. Co. v. Johnson (C. C. A. 10th) 157 F. (2) 653.

Tennessee Coal, Iron & R. Co. v. Muscada Local 123 (C. C. A. 5th) 137 F. (2d) 136.

The District Court of the United States In and For the District of Nevada, Had Jurisdiction to Issue a Preliminary Injunction Pendente Lite, As the Norris-La Guardia Act, Did Not Apply As No Labor Dispute Was Present.

Specification of Error No. 2

The Norris-LaGuardia Act, 29 U. S. C. A., Sec. 101 et seq., prohibits any court of the United States to issue any restraining order, temporary or permanent injunction "in a case involving or growing out of a labor dispuite, except in a strict conformity with the provisions of such sections; nor shall any such restraining order or temporary or permanent injunctions be issued contrary to the public policy disclosed in such sections." (29 U. S. C. A., Sec. 101.)

Injunctions may issue, but must be in strict conformity with the provisions of the act, and not be contrary to expressed policy therein. If, however, a "labor dispute" is present and after hearing of testimony of witnesses in open court, in support of the allegations of a complaint under oath, and findings that unlawful acts have been threatened; that irreparable injury to complainant's property will follow; that greater injury will be inflicted on complainant if relief is withheld; and there is no adequate remedy at law, nor public official charged with a duty to protect complainant's property, the court possesses plenary power to issue an injunction. (29 U. S. C. A., Sec. 107.)

But, if there is no "labor dispute," an employer will have grounds for obtaining an injunction to prevent unions from interfering with his business.

In *Columbia River Packers Association, Inc., v. Hinton,* 315 U. S. 143, 86 L.ed. 750,62 S.Ct. 520, the dispute arose over the terms and conditions under which Pacific Coast Fishermen's Union (respondents) would sell fish to the canning plants. The District Court held that since no "labor dispute" existed, the jurisdictional requirements of the Norris-LaGuardia Act were irrelevant, and after determining respondents had violated the Sherman Act, 26 Stat. at L. 209, Chap. 647, 15 U. S. C. A. Sec. 1, issued an injunction. The Court of Appeals for the Ninth Circuit reversed, holding that a "labor dispute" existed which, therefore, deprived the lower court of jurisdiction. Certiorari was granted and the Supreme Court sustained the holding of the District Court.

The controversy in the Columbia River Packers' case, supra, was precipitated by refusal of the petitioners to accede to respondents' demand that petitioners "not buy fish from non-members of the union." Mr. Justice Black in delivering the opinion stated: (315 U. S. 145.)

> "We think that the court below was in error in holding this controversy a 'labor dispute' within the meaning of the Norri-LaGuardia Act. *That a dispute among businessmen over the terms of a contract for the sale of fish is something different from a 'controversy concerning terms or conditions of employment, or concerning the association . . . of persons . . . seeking to*

> *arrange terms or conditions of employment' calls for no extended discussion.''* (Emphasis ours).

Again on page 146, 315 U. S., the court remarked:

> ''We recognize that by the terms of the statute there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee. *But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing.* (Empahsis ours).

It does not necessarily follow that every dispute between employer and employee, or the agents of either, precipitates a ''labor dispute.'' In *Bakery Sales Drivers Local Union No. 33 v. Wagshol,* 333 U. S. 437, 68 S.Ct. 630, 92 L.ed. 599, the Supreme Court cautioned that there must be more than a dispute or controversy between employeer and employee to fall within the meaning of a ''labor dispute'' as defined in the Norris-LaGuardia Act.

In the Bakery Sales Drivers case, the controversy concerned the method of payment by the proprietor of a delicatessen for bread purchased. The union representative of the driver insisted payment should be made directly to the driver; the delicatessen proprietor maintained payment should be made to the bakery. The controversy caused the union to picket and boycott the delicatessen shop. The District Court granted a temporary restraining order and, at the same time, denied a motion to dismiss. Defendant-appellant union filed a notice of appeal which plaintiff-

respondent moved to dismiss. Appeal as a matter of right would follow if a "labor dispute" existed. (29 U. S. C. A., Sec. 110.)

The Court, speaking through Mr. Justice Frankfurter, said:

> "To hold that under such circumstances a failure of two businessmen to come to terms created a labor dispute merely because what one of them sought might have affected the work of a particular employee of the other, would be to turn almost every controversy between sellers and buyers over price, quantity, quality, delivery, payment, credit or any other business transaction into a "labor dispute." Cf. *Columbia River Packers Asso. v. Hinton,* 315 U. S. 143, 86 L.ed. 750, 62 S.Ct. 520. Furthermore, on the basis of what we have before us, respondent's disagreement with Hinkle over the delivery hour was a dead controversy, not involved in the subsequent dispute with the union, or in the boycott against which the injunction was directed."

In the instant case before this court for decision, the first question presented was the power of the District Court to preserve the status quo pending determination on the merits as to whether the Labor Management Relations Act, 1947 governed future negotiations. If the Labor Management Relations Act, 1947, applied, then the closed shop provisions sought by respondents herein could not be included within the provisions of any master agreement which would succeed the agreement expiring on May 21, 1948. No master agreement between the parties could be signed prior to ascertaining whether or not the Labor Management Relations Act, 1947, controlled the negotiations. There could not be a "labor dispute" within the purview of the Norris-

LaGuardia Act, unless and until the initial question of the applicable and controlling law was settled.

Repeatedly in the lower court this position was urged and asserted to the court for its determination. (R. pp. 73, 74, 75, 77, 78, 82, 127, 133). TheDistrict Court in rendering its ruling on the motion for a preliminary injunction stated:

> "I cannot understand how it could be said there is no labor dispute involved here. I think counsel has stated that the purpose of this is to prevent labor dispute from arising, or series of labor disputes from arising, so then we are, of course, interested, involved here in consideration of labor disputes not existing now, but contemplated in the future." (R.p.141).
>
> "The only question before the court is whether or not this preliminary restraining order should be continued or whether a temporary restraining order or preliminary injunction should be issued pending lite, and that is the only point I am attempting to decide." (R.p.143).

The learned court in deciding it was without power to grant a preliminary injunction because a "labor dispute" existed (R.p.141) assumed, without deciding, the precise question to be resolved, to-wit: are appellants engaged in interstate commerce? The District Court's holding of lack of power to issue a preliminary injunction was predicated upon the proposition that the Norris-LaGuardia Act precluded issuing an injunction because a "labor dispute" within the purview of Sec. 7, of that Act. The Norris-LaGuardia Act would be applicable if, and only if, appellant is engaged in, or affecting interstate commerce. The court ex necessitate assumed that very issue to arrive at its decision.

The Norris-LaGuardia Act limited the power of federal courts to grant injunctions, but it did not extinguish this power. In *United States v. United Mine Workers,* 330 U. S. 258, 91 L.ed. 884, 67 S.Ct. 677, Mr. Chief Justice Vinson, stated, in delivering the majority opinion of the court:

> "By the Norris-LaGuardia Act, Congress divested the Federal courts of jurisdiction to issue injunctions in a specified class of cases. It would probably be conceded that the characteristics of the present case would be such as to bring it within that class if the basic dispute had remained one between defendants and a private employer, and the latter had been the plaintiff below." (330 U. S. at page 270).

The Chief Justice, thereafter (330 U. S. 292), observed:

> "Pending a decision on a doubtful question of jurisdiction, the District Court was held to have power to maintain the status quo and punish violations as contempt."

It is true the Supreme Court in discussing the applicability of the Norris-LaGuardia Act in the United Mine Workers' case, did so addressing the same to argument of appellants, that issuance of the injunction was contrary to said Act, since the United States must be considered as employer, and therefore, within the purview of the Norris-LaGuardia Act. However, it is certainly clear therefrom that injunctive remedies in labor disputes are not completely extinguished by the Norris-LaGuardia Act. Even if it be assumed that a "labor dispute" existed within the defined meaning of the Norris-LaGuardia Act, the District Court, upon making necessary findings of fact, could have granted an injunction. 29 U. S. C. A., Sec. 107.

Appellant's theory herein has been, and now is, that there existed no "labor dispute" and, therefore, the Norris-LaGuardia Act was inapplicable. Accordingly, the District Court should have granted the injunction as prayed.

For the reasons above presented to this Honorable Court, appellant respectfully asks that the judgment and decree of the District Court be reversed.

Dated, Reno, Nevada.

April 1, 1949.

Respectfully submitted,

Brown & Wells
Theodore Haugh
Attorneys for Appellant.